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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-714

Filed: 15 August 2017

Duplin County, No. 12 CRS 51892

STATE OF NORTH CAROLINA,

v.

JEREMY LEE STEPHENS, Defendant.

Appeal by defendant from judgment entered on or about 18 September 2015 by Judge James G. Bell in Superior Court, Duplin County. Heard in the Court of Appeals 23 February 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Steven M. Arbogast, for the State.

Glover & Petersen, P.A., by Ann B. Petersen, for defendant-appellant.

STROUD, Judge.

Defendant Jeremy Lee Stephens (“defendant”) appeals from his conviction of first degree murder. On appeal, defendant argues that the trial court erred by denying defendant’s motion to dismiss the murder charge because the indictment charged defendant with the murder of someone other than the actual victim. Defendant also argues that the trial court erred by allowing testimony from an officer

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about defendant's unannounced visit to the sheriff's office. We hold that the trial court did not err in denying defendant's motion to dismiss and in allowing the officer's testimony.

Facts

The State's evidence at trial tended to show the following facts. In the early morning hours of 21 August 2012, a body was found in a ditch on the side of Carrolls Road in Warsaw, North Carolina. The body was identified later that morning as that of Henry Lionel Bouyer, Jr. ("Bouyer"). An autopsy revealed three gunshot wounds: two penetrating wounds and one graze wound to his lower right abdomen. The two penetrating wounds were both fired from a close distance. Bouyer was 37 years old at the time of his death and resided with his parents in Magnolia, North Carolina. He was known by his nickname of "Pee Wee" to his family and friends. Bouyer drove a tractor-trailer for a living but also owned a Suzuki motorcycle he loved to ride whenever he was not working. Bouyer's cell phone was found in multiple pieces scattered on the side of the road near his body.

That same day, 21 August 2012, defendant and his stepfather, Herbert Stroud ("Stroud")¹, visited Travis Jones ("Jones"), a mechanic, and asked him to paint and stretch out a motorcycle they had in their possession. Jones told defendant and Stroud that he would check on some parts and if defendant paid for the parts, he

¹ This Court recently issued an opinion in Stroud's appeal. *See State v. Stroud*, __ N.C. App. __, 797 S.E.2d 34, *appeal dismissed and disc. review denied*, __ N.C. __, 799 S.E.2d 872 (2017).

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could do the requested work on the bike. Jones spoke with defendant on the phone a few days later, on 24 August 2012, and defendant told Jones he wanted him to sell the bike. Jones responded that he could not sell it without any paperwork, but if defendant could bring the title paperwork to him then he would try to sell it. Defendant and Stroud showed up at Jones' residence around 8:00 p.m. that evening unannounced. Jones noted that they were "just acting a little weird[.]" Jones asked if they were able to find the paperwork, and they said "no." Jones then asked if there is a problem, and Stroud replied: " 'Any problem we got been [sic] handled.' " Defendant "snickered" at this response. The motorcycle was later located and recovered at Jones' house by police and identified as Bouyer's motorcycle.

Police collected Bouyer's cell phone from the scene and were able to determine the phone number associated with it. Investigators determined that the phone was Bouyer's and were able to obtain the call detail records for the phone. From those records, investigators were able to identify phone numbers Bouyer had been in contact with in the day or two prior to his death. One such number belonged to defendant. Police then set up a surveillance team on 24 August 2012 to perform surveillance on defendant and Stroud.

On 27 August 2012, defendant and Stroud came to the Duplin County Sheriff's Office unannounced. Phillip Humphrey, a supervisor of detectives for the Duplin County Sheriff's Office, and Special Agent Stratton Stokes of the SBI, were at the

Sheriff's Office when defendant and Stroud arrived. Humphrey and Stokes first interviewed Stroud and then spoke with defendant. When asked at trial why, based on his experience, a defendant would show up unannounced, Humphrey replied: "Trying to gain information and trying to find out what's happening." Defendant's trial counsel objected, but the trial court overruled the objection.

Investigators ultimately searched the residence where defendant and Stroud lived three times: 28, 29, and 30 August 2012. Stroud's jeep was also seized on 28 August 2012 and searched during the 29 August 2012 search. Spent shotgun shells and 9 mm ammunition were found on the property, and a 9 mm round and unfired shotgun shells were located in Stroud's jeep. Bouyer's wallet was also found in Stroud's jeep, underneath the center console, and the wallet contained the registration for Bouyer's motorcycle. A 9 mm pistol was found in a heater in Stroud's bedroom. Based on examination and test firing of the 9 mm pistol, a ballistics expert determined the spent 9 mm casing found at the murder scene was fired from the weapon recovered in Stroud's bedroom.

Defendant was indicted on or about 6 October 2014 for first degree murder, felony larceny, possession of stolen goods, and robbery with a dangerous weapon. The indictment identified the victim as "Henry Bouyer."

Defendant's case came to trial on 8 September 2015. The jury returned a verdict on 18 September 2015 finding defendant guilty of all charges. The verdict

sheet identified the victim as “Henry Bouyer, Jr.” The trial court entered judgment and sentencing for the first degree murder charge and arrested judgment on the remaining three charges. Defendant was sentenced to life imprisonment without the possibility of parole. Defendant timely appealed to this Court.

Discussion

I. Indictment

Defendant first argues on appeal that the trial court erred by denying defendant’s motion to dismiss the charge of murder because the indictment stated the victim’s name as “Henry Bouyer” and the verdict form listed it as “Henry Bouyer, Jr.” Defendant claims that “the submission of a verdict for the murder of the actual victim constituted an impermissible amendment of the indictment.” (Original in all caps).

Under N.C. Gen. Stat. § 15A-923(e) (2015), “A bill of indictment may not be amended.” Our Supreme Court has previously explained:

This statute [N.C. Gen. Stat. § 15A-923] fails to include a definition of the word “amendment.” The North Carolina Court of Appeals has ruled upon the interpretation of this subsection [in a prior case.] That court defined the term amendment to be any change in the indictment which would substantially alter the charge set forth in the indictment. We believe the Court of Appeals, in its diligent effort to avoid illogical consequences, correctly interpreted this statute’s subsection.

State v. Price, 310 N.C. 596, 598, 313 S.E.2d 556, 558 (1984) (citations and quotation marks omitted). “Several cases from this Court have held that changes to the surname of a victim is not an amendment for purposes of [N.C. Gen. Stat. §] 15A-923(e).” *State v. Hewson*, 182 N.C. App. 196, 211, 642 S.E.2d 459, 469-70 (2007).

The State, by contrast, claims that defendant’s argument is actually that there was a fatal variance between the indictment and the verdict, and the State argues that no such fatal variance occurred because the indictment gave defendant reasonable notice of the identity of his victim.

It is well settled that a valid bill of indictment is essential to the jurisdiction of the trial court to try an accused for a felony. The purpose of the indictment is to give a defendant reasonable notice of the charge against him so that he may prepare for trial. A defendant can challenge the facial validity of an indictment at any time, and a conviction based on an invalid indictment must be vacated.

State v. Campbell, 368 N.C. 83, 86, 772 S.E.2d 440, 443 (2015) (“*Campbell I*”) (citations and quotation marks omitted)².

² In *Campbell I*, our Supreme Court reversed a previous decision of this Court, *State v. Campbell*, 234 N.C. App. 551, 759 S.E.2d 380 (2014), which vacated a defendant’s larceny conviction and reversed his conviction for breaking and entering, and remanded the matter back to this Court. *Campbell I*, 368 N.C. at 88, 772 S.E.2d at 444-45. The Supreme Court recently issued an opinion reversing this Court’s subsequent decision on remand, *State v. Campbell*, __ N.C. App. __, 777 S.E.2d 525 (2015), and once again remanded the matter to this Court for a third time “so that it may independently and expressly determine whether, on the facts and under the circumstances of this specific case, to exercise its discretion to employ Rule 2 of the North Carolina Rules of Appellate Procedure, suspend Rule 10(a)(1), and consider the merits of defendant’s fatal variance argument.” See *State v. Campbell*, __ N.C. __, __, 799 S.E.2d 600, 603 (2017) (“*Campbell II*”).

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In *State v. Bumper*, 5 N.C. App. 528, 535, 169 S.E.2d 65, 69, *aff'd on other grounds*, 275 N.C. 670, 170 S.E.2d 457 (1969), the defendant claimed that there was “a fatal variance between the indictments and the proof with respect to the name of the victim.” The indictments each listed the name of “Monty Jones[,]” while at trial the witness testified that his legal name is “Manson Marvin Jones, Jr.” and Monty Jones is his nickname, not his legal name. *Id.* This Court held that “[i]t was clear throughout the testimony that Manson Marvin Jones was generally referred to by his nickname ‘Monty.’ There was no uncertainty as to the identity of the prosecuting witness.” *Id.*, 169 S.E.2d at 69-70. This Court noted:

the essential thing is the requirement of correspondence between the allegation of the name of the woman transported and the proof is that the record be in such shape as to inform the defendant of the charge against her and to protect her against another prosecution for the same offense. . . . The record of defendant’s trial clearly shows that Monty Jones and Manson Marvin Jones, Jr., are one and the same person; thus he is protected against a second prosecution for the same offense.

Id., 169 S.E.2d at 70 (citation and quotation marks omitted).

Similarly, in *State v. Pender*, __ N.C. App. __, __, 776 S.E.2d 352, 359 (2015), this Court explained that “our Courts have not found fatal variances where a discrepancy in the victim’s name was inadvertent and the individual referred to in the indictment was the same person alleged to be the victim at trial.” In *Pender*, this Court concluded:

Here, the evidence is undisputed that one of defendant's victims for kidnapping and assault on the date alleged in the indictment naming "Vera Alston" as the victim was defendant's mother-in-law, Vera Pierson. Given this, there was no uncertainty that the identity of the alleged victim "Vera Alston" was actually "Vera Pierson." Further, at no time in the proceeding below did Defendant indicate any confusion or surprise as to whom Defendant was charged with having kidnapped and assaulted. We, therefore, hold that there was no fatal variance.

Id. at ___, 776 S.E.2d at 359 (citations, quotation marks, and brackets omitted).

Whether we characterize the issue as defendant does or the State, we ultimately reach the same conclusion that the trial court did not err. In this case, the warrant for defendant's arrest clearly identified the murder victim as "Henry Lionel Bouyer, Jr." The indictment included the victim's correct first and last names, but omitted his middle name and the "Jr." at the end. There was never any doubt in this case about the identity of the murder victim as stated on the indictment.

Although defendant now raises issue on appeal based upon the fact that the victim's father's name is, unsurprisingly, Henry Lionel Bouyer, Sr., whose name was mentioned at trial, there was never any question about whether defendant was charged with the murder of Bouyer or his father (who as far as we can tell from the transcript, was still very much alive at the time of defendant's trial). *See, e.g., Hewson*, 182 N.C. App. at 212, 642 S.E.2d at 470 ("At no time in the proceeding did Defendant indicate any confusion or surprise as to whom Defendant was charged with

having murdered.”). While our Supreme Court has found that an indictment charging the defendant with a crime against someone other than the victim is a fatal variance, *see, e.g., State v. Abraham*, 338 N.C. 315, 340, 451 S.E.2d 131, 144 (1994) (“Where an indictment charges the defendant with a crime against someone other than the actual victim, such a variance is fatal.”), that is not what happened here.

Defendant’s argument as to the victim’s name on the indictment is a “shadowy nothing[],” as our Supreme Court explained all the way back in 1898:

The practical sense of the age demands that guilt or innocence shall be determined upon proof, and that immaterial variances and refinements and technicalities shall not avail defendants when they are not in truth prejudiced thereby. . . . It is not astonishing that defendants who have no meritorious ground of exception should clutch at shadowy nothings, but our courts have faithfully followed the letter and spirit of the legislation which favors trials upon the merits.

State v. Hester, 122 N.C. 1047, 1050, 29 S.E. 380, 381 (1898). Accordingly, we hold that the trial court did not err in denying defendant’s motion to dismiss the charge of murder.

II. Testimony

Defendant’s remaining argument on appeal is that the trial court erred by allowing Investigations Supervisor Philip Humphrey to testify regarding defendant’s purpose for coming to the sheriff’s office unannounced. Specifically, defendant argues that “[a]dmission of Humphrey’s opinion about [defendant]’s purpose was error. A

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lay witness may not offer an opinion about another person's intention on a particular occasion."

Rule 701 of the Rules of Evidence describes when opinion testimony by a lay witness may be allowed:

If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

See also State v. Friend, 164 N.C. App. 430, 437, 596 S.E.2d 275, 281 (2004) ("[A] lay witness may . . . testify to his opinions, which are rationally based on his perceptions and helpful to a clear understanding of his testimony of the determination of a fact in controversy."). "[W]hether a lay witness may testify as to an opinion is reviewed for abuse of discretion." *State v. Washington*, 141 N.C. App. 354, 362, 540 S.E.2d 388, 395 (2000).

In questioning Humphrey at trial, the State engaged in the following line of questioning:

Q [The State]. And do you know for what purpose the defendant came to the sheriff's office?

A. *I don't -- can't . . . say for sure why they came, but through my experience in investigations, I felt like they was trying to find out --*

[Defense counsel]: Objection.

THE COURT: What's the objection?

[Defense counsel]: Lack of a foundation for his opinion. He said he wasn't sure why they came.

(Emphasis added).

The trial court then asked the State to rephrase the question:

THE COURT: Can you rephrase the question?

[The State]: Sure.

How many cases have you investigated prior to this case, sir?

[Humphrey]: Numerous of cases [sic].

Q. And in most cases, do you try to interview the defendant towards the end?

A. Yes, sir.

Q. And what happens when a defendant shows up unannounced?

A. We try to find out, first of all, why he's there; who asked him to come, and see what he wants, if he has gained any information, or if he's trying to get information.

Q. And in your experience, sir, in the interviews you have done before, what reason or reasons would a defendant show up unannounced?

A. *Trying to gain information and trying to find out what's happening.*

[Defense counsel]: Objection, Your Honor.

THE COURT: Overruled.

(Emphasis added).

This line of questioning continued as follows:

Q. Going into the interview, how did your mindset change versus an interview that you had scheduled and you knew all of the information versus an interview which comes up out of nowhere?

A. *I felt like they were just trying to find out what we knew.*

[Defense counsel]: Objection.

THE COURT: And the objection?

[Defense counsel]: Can we approach?

THE COURT: Yes.

(Bench conference was held with both attorneys present).

IN OPEN COURT:

[The State]: Sir, What I'm trying to ask you specifically is does it change your investigative techniques somewhat how you approach the interview, how you ask the questions in a situation where somebody shows up unannounced versus one where they come in on your time, and your place, and on your schedule, when you're ready?

[Humphrey]: Yes, sir, it does.

[The State]: How does it change how you conduct the interview?

[Defense counsel]: Again, Your Honor, we object. May we approach again?

THE COURT: Yeah.

(Bench conference was held with both attorneys present.)

IN OPEN COURT:

[The State]: Lieutenant Humphrey, was your mindset changed in this regard with him coming in unexpectedly and you not being fully prepared? Was it your intention to go into the interview and do more listening than you did talking?

[Humphrey]: Yes, sir.

Q. And would that, perhaps, be different in an interview that you scheduled and you were recording or planning on doing?

A. Yes, sir.

(Emphasis added).

Here, defendant has failed to demonstrate an abuse of discretion by the trial court. Humphrey's testimony was a generalized statement about why "a" defendant might show up at a police station unannounced; it was not a statement about defendant specifically. This statement was based on Humphrey's years of experience

working at the sheriff's office and previous interviews he had conducted, and it was a general opinion statement related to his investigation. *See, e.g., State v. Daughtridge*, __ N.C. App. __, __, 789 S.E.2d 667, 672 (2016) (“[I]t is apparent from the context of Investigator Sole’s testimony on direct examination that he was simply explaining the steps he took in furtherance of his ongoing investigation. His statements expressing skepticism over Defendant’s account of these events served merely to provide context and explain his rationale for continuing to subject Defendant to additional scrutiny. Such testimony does not run afoul of Rule 701. Indeed, we have expressly held that testimony elicited to assist the jury in understanding a law enforcement officer’s investigative process is admissible under Rule 701.” (Citation and quotation marks omitted)), *disc. review denied, dismissed in part as moot*, __ N.C. __, 795 S.E.2d 363, and *disc. review denied, dismissed in part as moot*, __ N.C. __, 795 S.E.2d 370 (2017). When Humphrey was speaking more specifically about defendant, he stated that he could not say for certain why this particular defendant was at the sheriff’s office, but from his experience, the reason people may tend to show up unannounced was to try to gain information on a case. The trial court did not abuse its discretion by allowing this testimony.

Defendant relies in part on our Supreme Court’s decision in *State v. Sanders*, 295 N.C. 361, 245 S.E.2d 674 (1978). In *Sanders*, our Supreme Court held that the trial court properly excluded the testimony of witnesses that “in their opinion, the

officers went into the cell for the purpose of beating up defendant” because “it does not appear that these witnesses were in any way more qualified than the jury to conclude what the officers intended to do at that time[.]” *Id.* at 369, 370, 245 S.E.2d at 680-81, 681. Our Supreme Court later distinguished *Sanders* in *State v. McElroy*, 326 N.C. 752, 758, 392 S.E.2d 67, 70 (1990), and found that the witness’s testimony in *McElroy* met the Rule 701 requirements where the witness, Rutherford, “was explaining what the statement meant to him and thus what effect it had on him, and this testimony was helpful in explaining why Rutherford did not immediately report [the victim’s] death to law enforcement authorities.” In reaching this conclusion, the Court noted that unlike *Sanders*,

[I]n the present case, defendant spoke directly to Rutherford which placed Rutherford in a better position to tell the jury what that statement meant to him than the witnesses in *Sanders*. In *Sanders*, the witnesses were merely speculating as third parties as to what the officers were going to do to the defendant when the officers entered the cell. Rutherford, on the other hand, was asked to tell what defendant’s statements meant to Rutherford himself.

McElroy, 326 N.C. at 758, 392 S.E.2d at 70. In this case, Humphrey similarly testified not to what defendant’s intent was in coming to the sheriff’s office unannounced, but rather to how he generally perceived such a move based on his personal training and experience from working at the sheriff’s office. This testimony helped provide the jury context for Humphrey’s subsequent interview of defendant and his state of mind at that time.

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Furthermore, even assuming it was error and the trial court should not have allowed Humphrey to testify as to his opinion relating to the purpose of the unannounced visit, any error was harmless at best. Even without considering Humphrey's statement, the jury heard an overwhelming amount of evidence that supported its finding of defendant's guilt. The jury was given instructions regarding the theory of acting in concert, and the evidence that connected both defendant and Stroud to Bouyer's murder included: Bouyer told numerous people he was selling his motorcycle; defendant spoke with investigators and said that he had been talking to Bouyer to negotiate the purchase of the motorcycle; the motorcycle was found at Mr. Jones's business and defendant rode it there; phone records connected defendant to Bouyer in the time leading up to his death; Bouyer's wallet was found in Stroud's jeep and contained the title to the motorcycle; and a spent 9 mm shell casing that was found at the scene where Bouyer's body was discovered matched a gun recovered at the house where both defendant and Stroud lived. Defendant cannot establish a reasonable possibility that the jury would have reached a different verdict but for Humphrey's opinion testimony regarding defendant and Stroud showing up unannounced at the sheriff's office. Accordingly, we hold that the trial court did not abuse its discretion.

Conclusion

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In sum, we hold that the trial court did not err when it denied defendant's motion to dismiss the murder charge, as the indictment sufficiently placed defendant on notice for the charges against him and specifically whom he was charged with committing the crime against. Additionally, we hold that the trial court did not abuse its discretion in allowing Humphrey's testimony about defendant's unannounced visit to the sheriff's office. Even if we assume it was error to allow such testimony, any such error was harmless.

NO ERROR.

Judge DILLON concurs.

Judge MURPHY concurs in the result only.

Report per Rule 30(e).